UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE WANG THEATRE, INC.

and **Cases 01-CA-179293**

BOSTON MUSICIANS ASSOCIATION, A/W AMERICAN FEDERATION OF MUSICIANS LOCAL UNION NO. 9-535, AFL-CIO

RESPONDENT'S MOTION FOR RECONSIDERATION

Respondent The Wang Theatre, Inc. ("WTI") hereby moves for reconsideration of the November 10, 2016 Decision and Order by Chairman Pearce and Members Miscimarra and McFerran (the "Decision"), which grants summary judgment on the claim that WTI has unlawfully failed to bargain with the Boston Musicians Association ("BMA"). The three-page Decision errs by treating this as a test-of-certification case. WTI's arguments were not "rejected" in the representation case, 01-RC-166997. It is the Decision — not WTI's opposition to summary judgment — that relies on rewriting the January 28, 2016 Decision and Direction of Election ("DDE"). Under long-standing Board precedent ignored by the Decision, WTI has not violated the Act even if the certification of BMA were valid.

1. The Decision Contradicts Without Explanation Board Precedent Holding That There Is No Duty to Bargain Over a Previously-Certified But No-Employment Unit.

The Decision ignores the Board precedent holding that an employer has no duty to bargain, if one or no employees are employed in the unit and that is not a temporary condition. *Rice Growers Assn.*, 312 NLRB 837, 839 (1993) (employer's refusal to furnish information was lawful because "there were no unit employees who could generate a bargaining obligation"). *See also Kirkpatrick Elec. Co.*, 314 NLRB 1047, 1054 (1994) (employer lawfully repudiated contract where unit had one employee); *Stack Elec.*, 290 NLRB 575, 577 (1988) (employer may withdraw recognition from a union if there are one or no unit employees on a permanent basis).

Breaking from Board precedent without explanation, the Decision holds that WTI must honor the certification of a no-employment unit simply because the certification was issued in the prior year. (*See* Dec. at 1, fn. 1). The Decision ignores *Westinghouse Electric Corp.*, 179 NLRB 289 (1969). In that case, the Board held that the employer had no duty to bargain because the unit had only one employee, even though the certification had issued only three months before the employer's refusal to bargain. Contrary to the Decision, the Board has never held that a certification must be "honored during the certification year" for a no-employment or single-employee unit. *Westinghouse Electric Corp.* rejects that theory, and there is no subsequent contrary precedent. The Decision cites *King Electric, Inc.*, 343 NLRB No. 54, slip op. at 1, fn. 1 (2004), but that case did not involve a no-employment unit. It addressed and rejected an argument that a change in unit size from 11 to 6 employees shortly after an election constituted "unusual circumstances" relieving the employer of its obligation to bargain.

Here, contrary to the Decision, the lack of foreseeable unit employment is not "mere speculation." (*See* Dec. at 1, fn. 1.) It is established by the factual findings of the DDE and the August 22, 2016 affidavit of Michael Szczepkowski, General Manager of the Wang Theatre, that was filed in support of WTI's opposition to summary judgment ("Opp. Aff."). First, musicians who perform at the Wang Theatre are **not** generally in the certified unit. WTI does not "produce" shows but instead "contracts with independent producers" who bring their shows to the Wang Theatre. (DDE at 1.) The unit does not include the producers and thus does not include those musicians who producers obtain without involvement of WTI. The certified unit only covers those musicians that WTI may source to a producer to perform under the direction of the producer's conductor while the producer's show is at the Wang Theatre.

It is known that, by the end of April 2017, it will have been 29 months since there was last employment in the unit. As of January 2016, there had not been employment since December 28, 2014, when *White Christmas* ended its 16-performance run at the Wang Theatre. (*See* DDE at 2; Opp., Aff. Ex. A.) The producers for all currently scheduled shows, the last of which will run until April 30, 2017, will obtain their own musicians without involving WTI. (Opp., Aff. ¶¶ 25-26.)

It is therefore known that, by the end of 2016, no musician will satisfy the eligibility standard applied in the representation case. The Decision inaccurately suggests that WTI concedes there were eligible employees "at the time of the election" under the standard set forth in *Julliard School*, 208 NLRB 153 (1974). WTI submits the DDE misapplied *Julliard School* by ordering an election among musicians who worked at least 15 performances in the prior 2 years. As noted in WTI's Request for Review, *Steppenwolf Theatre Co.*, 342 NLRB 69 (2004), clarified that employees must have worked a total of 120 hours in the prior 2 years to satisfy the *Juilliard School* standard. At the time of the election here, no one satisfied the 120-hours standard. (*See* GC Mot., Ex. C at 15.) But even under the erroneous standard adopted by the DDE, no one would be eligible as of December 19, 2016, and thereafter through at least April 30, 2017.

To the extent the more distant future can be predicted, logic suggests that the lack of unit employment will continue. In labeling this "mere speculation", the Decision ignores that the producers can prevent there from ever being employment in the unit. "The producer determines whether live or record music will be used for a production; whether local musicians will be hired; and if so, how many." (DDE at 3.) Thus, the only circumstance in which there even *could* be unit employment is where a producer decides to use live musicians and "requests that [WTI] hire local musicians" for it to use while its show is at the Wang Theatre. (*See* DDE at 2.)

And since the representation case, producers have continued to directly hire and solely employ all musicians who have performed at the Wang Theatre. When necessary, producers have been sourcing local musicians through a payroll company that has a relationship with BMA. (*See* Aff. ¶¶ 22-25.) What the DDE found to be "unprecedented" in 2015, (DDE at 2, fn. 3), has been repeated in 2016 and will be for the known future. (*See* Aff. ¶¶ 26-28.) As BMA's July 2016 withdrawal of its February 2016 charge concedes, WTI has no legal obligation to source musicians for producers. (*See* Opp. at 5-6.)

In sum, the Decision rests on (1) ignoring Board precedent that there is no duty to bargain over a previously-certified but no-employment unit and (2) mislabeling facts establishing that the unit here is a no-employment unit as "mere speculation." Under current Board law, and accepting the factual findings of the DDE and the supplemental evidence proffered by WTI in this case, there is no duty to bargain irrespective of the validity of the certification. The Decision should therefore be rescinded and reversed.

2. The Decision Undermines The Bargaining Framework Described by the Board's Joint-Employer Decisions and Endorses Unlawful Bargaining Objectives.

The Decision also ignores the holding in the Board's joint-employer decisions that a certified union can only demand to bargain with an "employer" of a certified unit "over the employees with whom it has an employment relationship and only with respect to such terms and conditions that it possesses the authority to control." *Miller & Anderson, Inc.*, 364 NLRB No. 39, slip op. at 15 (2016) (citing *M.B. Sturgis, Inc.*, 331 NLRB 1298, 1306 (2000). *See also Browning-Ferris Indus. of California, Inc.*, 362 NLRB No. 186, slip op. at 18 (2015) ("Moreover, as a rule, a joint employer will be required to bargain only with respect to such terms and conditions which it possesses the authority to control.")

The Decision mischaracterizes the facts as: "the Union requested bargaining and the Respondent refused." (Dec. at 1.) The only "request" to bargain is a June 10, 2016 email from BMA seeking to "begin negotiations … for a successor agreement." (GC Mot., Ex K.) Given the absence of foreseeable employment in the unit, WTI asked BMA the logical question: "What could the parties possibly bargain over at this time?" (GC Mot. Ex. L.) BMA did not respond to that inquiry and instead filed the charge.

In fact, nothing in the record reflects that BMA has demanded to bargain over anything other than the employment decisions of the third-party producers. First, contrary to the Decision, the argument that WTI "lacked control over the unit's terms and conditions of employment" was not "rejected" in the representation case. (*See* Dec. at 1.) The DDE states that, when there historically had been unit employment, the producer "request[ed] that [WTI] hire local musicians", and WTI used a "local contractor to hire the musicians specified by the producer." (DDE at 2.) Based on that alone, the DDE concludes, "it appears [WTI] hires the employees and as such is clearly is an employer under the Act." (DDE at 3.) The DDE did not find there was any evidence of WTI's control over the terms and conditions of employment of musicians it had sourced. To the contrary, the DDE acknowledges that the producer's conductor has "artistic control over musicians" and that this is the case "regardless of how the musicians are sourced." (DDE at 3.) The DDE states that there was "no evidence indicating where other traditional supervisor authority lies." (DDE at 3.) Thus, the DDE did not "reject" WTI's argument that there was "no evidence" that it served as "anything more than a hiring agent." (*See* GC Mot., Ex. C at 10.) The Acting Regional Director ordered an election <u>despite</u> the lack of evidence of control by WTI rather than because there was any such evidence.

In any case, because there is no foreseeable unit employment, the only thing BMA could plausibly want to negotiate — and indeed the only bargaining demand BMA has described — is an arrangement that would create unit employment. Yet it is also undisputed that WTI does not have the authority to give BMA musicians the work in question. The DDE acknowledges that the producers have "artistic control over the shows" including over all issues relating to use of music and musicians. (DDE at 3.) Moreover, producers' use of musicians is often informed by collective bargaining between the producers and the American Federation of Musician ("AFM"), the BMA's "affiliated national organization." (DDE 2, fn. 2.) WTI therefore could only create unit employment if it were to involve itself in the employment decisions and labor relations of the third party producers.

BMA in fact recognizes that the producers and not WTI has the power to create unit employment. To the extent BMA has articulated a bargaining demand, it was during the representation hearing, and it was directed at the employment decisions of the producers. Specifically, BMA's Counsel admitted it would seek to create unit employment by demanding that WTI impose "obligations" on producers to "lay off" their musicians and obtain replacement musicians through WTI. BMA's Counsel explained BMA's bargaining goal: "if a non-union show comes, [the producer would] have to lay off 50 percent, and that is an obligation that the venue imposes on a non-union producer." (Aff., Ex. B at 18.) Counsel explained that for union shows, the BMA would seek language requiring the producer to "lay off a number of its touring musicians" and obtain local musicians through WTI. (Aff., Ex. B at 17.) Thus, the only bargaining demand of BMA, as far as the record reflects, is directed at the producers and would affect the employment of non-unit employees with whom WTI indisputably has no employment relationship, specifically those musicians the producers would be required to lay off.

The Decision does not dispute that this is would be an "unlawful arrangement" under Section 8(e) of the Act because it is "directed at the labor relations of third party producers." (*See* Dec. at 1.) Indeed, it would be. Section 8(e) prohibits any arrangement between a union and an employer, "express or implied", whereby the contracting employer agrees to "cease doing business with another person." 29 U.S.C. § 158(e). The "touchstone" of the analysis is whether the agreement is limited to the labor relations of the contracting employer (which here would be WTI) or whether it is also directed at the labor relations of other employers (here the producers). *NLRB v. International Longshoremen's Ass'n* , 447 U.S. 490, 504 (1980). A WTI-BMA arrangement whereby WTI could only contract with producers if the producers agreed to lay off their own musicians and instead use BMA musicians would be an unlawful under Section 8(e). *See Huntington Town House*, 203 NLRB 1078, 1082 (1973) (AFM Local violated Section 8(e) by seeking to enforce clause requiring patrons of ballroom to use only AFM Local musicians "on Huntington's premises").

Moreover, even if BMA's bargaining demand did not run afoul of Section 8(e), it would be inconsistent with the bargaining framework set forth by the Board's joint-employer decisions. Under the logic of those decisions, it cannot be that a union can seek a single-employer unit and then demand to bargain over unit employees' terms and conditions outside that employer's control, let alone over terms and conditions of non-unit employees with whom that employer has no employment relationship. Otherwise, unions could simply seek units with one employer and entirely side step the rule that an employer "is obligated to bargain only over the employees with whom it has an employment relationship and only with respect to such terms and conditions that it possesses the authority to control." *Miller & Anderson, Inc.*, 364 NLRB No. 39, slip op. at 15 (2016).

Conclusion

The Board should revoke and reverse the Decision. Presently, the Decision stands for the proposition that an employer has a duty to bargain over a no-employment unit where the union has not demanded to bargain over anything within the control of the employer and has suggested its goal is to force third-parties to layoff non-unit employees with whom the employer has no employment relationship. That cannot be the law.

Respectfully submitted,

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Certificate of Service

The undersigned certifies that the foregoing and the accompanying documents have been filed electronically with the National Labor Relations Board on the 25th day of November 2016, and also a copy has also been sent via email to counsel for Petitioner, Gabriel O. Dumont, Jr., at gdumont@dmbpc.net; and Counsel for the General Counsel, Lynda Rushing, at lynda.rushing@nlrb.gov.

/s/ Arthur G. Telegen